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In the Supreme Court of the United States

OCTOBER TERM, 1970

70-77

No. ~~1225~~

STATE OF NORTH CAROLINA,

Petitioner,

vs.

WAYNE CLAUDE RICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF UTAH, AMICI CURIAE

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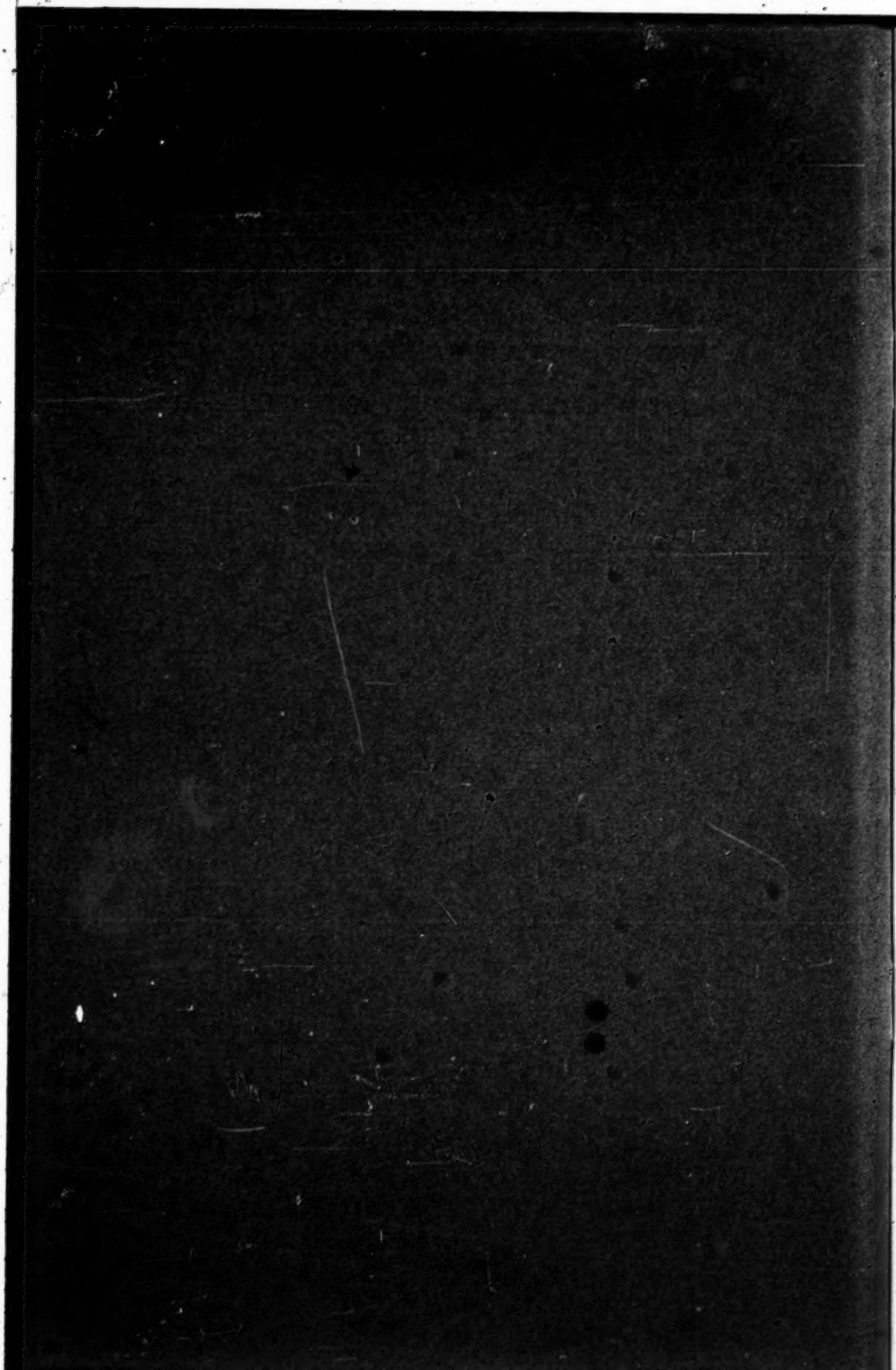

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1325

STATE OF NORTH CAROLINA,

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vs.

WAYNE CLAUDE RICE,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF UTAH, AMICI CURIAE

INTEREST OF AMICI

The specific issue presented to this Court in *North Carolina* v. *Rice,* No. 1325, is one in which an adverse decision could have a substantial impact on the criminal court structure of many states, including Utah. Such a decision holds the promise of converting the lower criminal trial courts of this state into mere "deadwood", which would necessarily require a comprehensive revision of Utah's judicial code.

STATEMENT OF THE CASE

Rice was arrested on July 2, 1968, on a North Carolina state highway in violation of G.S. § 20-138, (persons under the influence of intoxicating liquor or narcotic drugs). On July 19, 1968, in the General County Court of Buncombe County, Rice was convicted and sentenced to imprisonment for nine months, with suspension of that sentence upon the payment of a fine of $100.00, plus court costs. On appeal to the Superior Court of the County, Rice was found guilty and committed to two years' imprisonment. This Court granted Certiorari on the 5th day of April, 1971, limited to the issue:

> "Did imposition of a greater sentence following jury trial and conviction in superior court, after accused exercised his legal right to trial de novo upon appeal from conviction and sentence by inferior court, violate the Due Process Clause?"

ARGUMENT

I.

IMPOSITION OF A GREATER SENTENCE AFTER A TRIAL DE NOVO OR A "NEW TRIAL" DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

Utah, as well as a number of other states, has embodied within its judicial structure a system of dual levels of court. Consequently, a defendant who is charged with a less serious offense may be initially tried in one of Utah's inferior courts, with the unfettered right to appeal any conviction therein. Any defendant who is dissatisfied with the judgment rendered against him in the inferior court, to-wit: the justice and city courts, may, by statute, apply for a *new trial* in the

state district court. Utah Code Ann. § 78-4-17 (1953) reads:

> "A motion for a *new trial* may be made, and from any final judgment an appeal may be taken by either party in a civil case or by the defendant in a criminal case to the district court of the county, in the manner and with the same effect as provided by law for motions for new trials in and appeals from justices' courts in similar cases; . . ." (Emphasis ours.)

Utah Code Ann. § 78-5-14 (1953) reads:

> "Any person dissatisfied with a judgment rendered in a justices' court, whether the same was rendered on default or after trial, may apply for a *new trial* or appeal therefrom to the district court of the county within the time and in the manner provided by law." (Emphasis ours.)

What is the effect of a "new trial" in Utah? The Legislature has been quite explicit in both defining the term "new trial" and of confining the scope of review in that trial. More specifically, the Utah Legislature has defined a "new trial" to mean just that; a trial in which the parties are put in parity to each other and the formalities of judicial procedure are completely re-enacted. Utah Code Ann. § 77-38-1 (1953) states:

> "A new trial is a re-examination of the issue after a verdict or decision has been given."

Utah Code Ann. § 77-38-2 (1953) goes on to say:

> "The granting of a *new trial shall place the parties in the same position as if no trial had been had.* All evidence must be produced anew, and the former verdict or decision shall not be used or referred to either in evidence or in argument, nor be pleaded in bar of any conviction which might have been had under the information or indictment." (Emphasis ours.)

Additional refinements of Utah's judicial procedure regarding the defendant's right to appeal can be found in Utah Code Ann. § 77-57-38 (1953), which allows any defendant convicted in the justice court to appeal to the state district court. Utah Code Ann. § 77-57-43 (1953) also states:

> "An appeal duly perfected transfers the action to the district court for a new *trial anew.*" (Emphasis ours.)

In all criminal cases, there is provided a jury trial where there is an issue of fact. Utah Code Ann. § 77-27-2 (1953). Thus, where a defendant has been tried in the inferior courts, and an appeal or a new trial is granted, the new trial or appeal is conducted as an ordinary jury trial before the district court.

Quite obviously then, in Utah, the defendant's right to appeal for a "new trial" from an adverse decision in an inferior court is deeply rooted in the notion that when that new trial is granted, the defendant will stand in exactly the same position as he did prior to his conviction in the inferior court. This "new trial" theory becomes particularly important in criminal cases, because it places the burden upon the state, for the second time, to show beyond a reasonable doubt that the defendant is guilty of the crime he is accused of. The defendant is given a second chance to establish the presumption of his innocence. In fact, this "new trial" approach, which is statutorily imposed in Utah, is the very same approach taken by the court in *Lemieux* v. *Robbins,* 414 F. 2d 353 (1st Cir. 1969); cert. den. 90 S. Ct. 1247, 397 U. S. 1017, 25 L. Ed. 432.

> "Defendant has the benefit of two full opportunities for acquittal. If he fails to gain acquittal in the district court, his mere exercise of his right to 'appeal'

> not only gives him a new trial but vacates the judgment and removes the entire case to the superior court . . . [S]hould he elect to take advantage of a second and fresh opportunity, it does not seem unfair to us that, absent affirmative proof of vindictiveness, they should start again at parity." 414 F. 2d 355.

In *United States, ex rel. Starner* v. *Russell,* 378 F. 2d 808 (3rd Cir. 1967), the court expressed a view not unlike the court in *Lemieux,* when it stated:

> "When he appeared and entered a plea of not guilty at the second trial, the slate had been wiped clean and it was an entirely new case and bore no relationship whatsoever to his previous plea of guilty which he had entered." 378 F. 2d 811.

Consequently, the trial in an inferior court in Utah is considered to be a nullity, when the defendant is granted a new trial. Because of this view, there are a number of reasons why the defendant in a new trial should be held to have waived all of the consequences of the first trial and begin completely anew as the state is required to do.

One important factor lies in the trial judge's discretion in sentencing matters. The general rule has been that the length of the sentence imposed upon a defendant is a matter which should be left to the discretion of the trial judge. The obvious reason, of course, is the fact that the trial judge does possess a certain degree of expertise regarding the specific case before him. He alone is in the best position to determine the appropriate sentence and, therefore, his evaluation should be honored. The State of Utah realizes that such an argument holds true for the inferior trial judge's sentence decision as well. However, since the defendant in such cases has seen fit to exercise his statutory right to appeal, all of the results in

the new trial, including the sentence, are statutorily and completely independent of the trial in the inferior court. By deciding to appeal, the defendant has elected to accept all of the benefits and the risks of the new trial. As the court in *Starner, supra,* said:

> ". . . when he elects to have his case retried before a jury, he takes a chance after conviction on the trial judge's discretion in sentencing him." 378 P. 2d 811.

The second important factor for wiping the slate clean is the fact that in many cases, a substantial amount of objective information relevant to the sentencing is developed during the interim of the two trials. Obviously, to disallow the trial judge to take cognizance of that information would be an infringement upon justice. As this Court said in *North Carolina* v. *Pearce,* 395 U. S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969):

> "It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant . . ." 395 U. S. 724.

The Court goes on quoting from *Nichols* v. *United States,* 106 F. 679 (8th Cir. 1901):

> "A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant . . ." 395 U. S. 724.
>
> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked him must play no part in the sentence he receives after a new trial." 395 U. S. 725.

The Court did, however, say:

> "A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities'. . . ." (quoting from *Williams* v. *New York*, 337 U. S. 241 at 245.)
>
> "The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams* v. *New York, supra,* that a state may adopt the 'prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime'." 337 U. S. 245.
>
> "In order to assure the absence of such a [punitive] motivation we have concluded that whenever a a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." 395 U. S. 726.

In light of the *Pearce* decision, *supra,* it is the position of the State of Utah that as long as those reasons for a greater sentence are affirmatively set out, the defendant has in no way been denied Due Process of Law by receiving a different sentence in his new trial, even when those reasons go to the "life, health, habits, conduct and mental and moral propensities." *Williams, supra,* at 245. It is our position that many times during the course of a new trial in the District Court of Utah, information and evidence, not available at the time of the first trial, is brought forward at the new trial — information which may not necessarily be based upon identifiable conduct on the part of the defendant occuring after the orig-

inal sentencing, but information which is vital to both sides regarding the guilt or innocence of the defendant. Consequently, because this trial is a new trial in all respects, the information should be available to the judge in his sentencing of the defendant. It should be recognized that any new information or evidence could result in a lesser sentence as well as a greater sentence.

It is this point, the State of Utah feels, that distinguishes *Pearce, supra,* from the issue in the instant case. In *Pearce,* the original conviction was set aside for constitutional error. However, the issue in the *Rice* case is not one of reversal on constitutional error, but rather one of a trial anew in all respects; a trial which completely re-initiated all of the legal procedures, formalities, and rules available to the defendant; one in which no reference whatsoever was made to the original proceeding during the entire course of the trial de novo — essentially the same statutory procedure utilized by Utah in granting "new trials" from inferior courts. In a retrial situation, such as *Pearce,* the entire second proceeding is based upon what happened or did not happen in the initial trial. The existence of that second proceeding is predicated upon the first proceeding. Such, however, is not the case with a "trial de novo" or the "new trial" procedure as expressed by statute in Utah. Not only is that trial in the inferior court completely disregarded in the second proceeding, but the defendant is also given a second chance to prove his innocence after his guilt has been established in the lower court. Surely, the very system which gives the defendant the benefit of making the state prove its case twice should not further hamstring the state and the judicial process by denying it the use of the trial judge's expertise in the case, and

any subsequent information which may shed light on the guilt or innocence of the accused.

The State of Utah submits that the issue here presented falls squarely within the legal theory expressed in *Pearce and Williams* when the court said that a judge is not constitutionally precluded from imposing a greater sentence in a second trial when events subsequent to the first trial throw light upon the defendant's "life, health, habits, conduct, and mental or moral propensities." In *Pearce,* this concept was restrained to double jeopardy and the Equal Protection Clause. However, since a "trial de novo" or "new trial" is a trial anew, the State of Utah submits that the "greater sentence" theory of *Pearce* and *Williams* should be expanded to encompass Due Process of Law in a "new trial"; to wit: The Due Process Clause is in no way violated when in a "trial de novo" or "new trial" the judge imposes a greater sentence upon the defendant than he received in his first trial; when the reasons for the greater sentence affirmatively appear and are based upon objective information concerning the defendant's life, health, habits, conduct or mental and moral propensities.

Yet, another reason exists why this court should reverse the Fourth Circuit decision in *Rice, supra.* The reason lies in the area of balancing the interest of the defendant to his right to appeal in most states as opposed to the legitimate state interest of relieving appellate court congestion. The right of appeal is not specifically guaranteed by the Constitution, nor can it be considered an implicit requirement of due process. In *Griffin* v. *Illinois,* 351 U. S. 12 (1956), this court said:

> "It is true that a state is not required by the Federal Constitution to provide appellate courts of a right to appellate review at all."

Also, in *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966) this Court said:

> "This Court has never held that the states are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of *unreasoned* distinctions that can only impede open and equal access to the courts. Griffin v. Illinois, 351 U. S. 12; Douglas v. California, 372 U. S. 353; Lane v. Brown, 372 U. S. 477; Draper v. Washington, 372 U. S. 487." 384 U. S. 310, 311. (Emphasis ours.)

However, where the appellate avenues are established, they "must be kept free of *unreasonable* distinctions." (Emphasis ours.) *Rinaldi, supra.* We submit that the interest intended to be protected here is not only a reasonable interest, but also one in which the states have a compelling interest in retaining. This Court is well aware of the crowded situation that exists, not only on its own calendar, but also on the calendar of practically every court of this country. This is not to imply that the crowded court dockets of this nation is a justifiable reason, in and of itself, for "chilling" one's right to appeal. It most certainly is not. However, other considerations are involved.

At the present time, at least twenty-two states, including Utah, have established within their judicial procedures' system a dual court arrangement which allows a convicted defendant to appeal for a "trial de novo" or a new trial.[1]

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[1] ARIZONA—A.R.S. Section 22-374.
ARKANSAS—Ark. Stat. Sections 44-501, 502 and 509.
COLORADO—Rule 37(f) Colo. Rules of Crim. Pro.
FLORIDA—Constitution of Florida, Art. V, Sections 11(2) and 6(3). See also F.S.A. Sections 932.53, 54, 55 and 56.
INDIANA——Burns' Ind. Stat. Ann. Section 9-721.
KANSAS—K.S.A. Section 22-3610.

Consequently, the ramifications of an adverse decision in this case could have horrendous consequences on the judicial procedures in many states. If the higher court, the District Court in Utah, could not impose a greater sentence, when such a sentence was consistent with additional information gathered subsequent to the first trial, every defendant would automatically appeal that initial conviction. The result is twofold. First, because of the substantial influx of appeals, the appellate dockets become even more crowded. Second, the role played by the inferior courts in the states' judicial procedures is completely voided, since that role would be reduced to mere procedure without any substantive value whatsoever. This in turn could only result in a complicated and expensive reconstruction of the judicial procedures in at least twenty-two states.

KENTUCKY—K.R.S. Section 23.032 and Rule 12.06 Ky. Rules of Crim. Pro.

MAINE—Me. Rules of Crim. Pro., Dist. Ct. Rules 37(a) and 39(a), (b) and (c).

MARYLAND—Baltimore City Municipal Code (Art. 5, Section 43, Ann. Code of Md., Vol.I, 1968 Replacement Vol.) and Art. 52 Section 43, Ann. Code of Md., Vol. 5, 1968 Replacement Vol. See also Art. 26, Section 156, Ann. Code of Md., Vol. 2, 1966 Replacement Vol., 1970 Cumm. Supp.

MINNESOTA—M.S.A. Section 488.20 and Sections 633.20, 21 and 22.

MISSISSIPPI—Miss. Code Sections 1201 and 1202.

MISSOURI—Supreme Court Rule 22, Sections 10 and 11.

MONTANA—R.C.M. Section 95-2009.

NEVADA—Rule 76 Justices' Court Pro.

NEW HAMPSHIRE—N.H.R.S.A. Sections 502.18, 502A:11 and 12, and 599:1.

NEW MEXICO—N.M.S.A. Section 36-15-3(A).

NORTH CAROLINA—G.S.N.C., 65 Section 20-138 (1965).

NORTH DAKOTA—N.D. Cent. Code Sections 33-12-40 and 41.

TEXAS—Vernon's Ann. Code of Crim. Pro. Sections 44.17 and 45.10.

VIRGINIA—Va. Code Section 16.1-136.

WASHINGTON—R.C.W. Sections 3.50.280 and 3.50-410.

It is also apparent that the state has a compelling or legitimate interest for another reason. As was previously stated, many times between a trial in an inferior court and a new trial in a district court, additional information regarding the defendant is discovered, which may bear on his guilt or innocence. As the court in *Williams, supra,* stated:

> ". . . statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." 337 U. S. 247.

Consequently,

> ". . . The state may have an important interest in the imposition of a sentence that appears just in light of the latest and best information." *United States* v. *Coke,* 404 F. 2d 836, 843 (2nd Cir. 1968).

The State of Utah submits, in the words of the Court in *Lemieux, supra*:

> ". . . procedures which merely 'chill' this right must be tolerated if they support legitimate state objectives and are fair and reasonable." 414 F. 2d 356.

It is an undeniable fact that if this Court affirms the decision in *Rice, supra,* that the result will be an influx of appeals to the already overcrowded appellate dockets. In addition, the inferior courts of many states will become mere "deadwood" in the judicial system, and the states will be denied the right to gear their penal procedures and programs to modern philosophies of penology. Surely, these state interests taken in total do not violate the "unreasonable distinction" test of *Rinaldi, supra.* The state does have a legitimate, substantial and compelling interest in permtting the trial judge to impose the sentence he sees fit in light of any and all information which comes to him regarding the defendant,

whether that be a greater or lesser sentence. *Lex plus laudatur quando ratione probatur.*

Finally, the State of Utah can only emphasize the propriety of limiting the federal role in governing state criminal procedures because of the state's traditional discretion there. Mr. Justice Harlan said in *Spencer* v. *Texas*, 385 U. S. 554 (1967):

> "But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedures." 385 U. S. 564.

In addition,

> "It is the essence of our federalism that the States should have the widest latitude in the administration of their own system of criminal justice." *Hoag* v. *New Jersey*, 356 U. S. 464, 468 (1958).

Mr. Justice Black dissenting in part in *Jackson* v. *Denno*, 378 U. S. 368 (1964) also urged a measure of judicial self-restraint upon the Court.

> "My wide difference with the court is in its apparent holding that it has the constitutional power to change state trial procedures . . . [N]o constitutional provision gives this Court any such law-making power." 378 U. S. 407-408.

CONCLUSION

For the reasons stated above, the judgment should be reversed.

Respectfully submitted,

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